PRICE MAINTENANCE

Among the problems connected with market distribution of commodities, none has received more attention during the past few years than that of legalized maintenance of resale prices.[1] At each session of Congress during the past few years bills have been

[1] The mass of controversial literature upon the subject of price maintenance is very large indeed. This article is based chiefly upon the large volume of evidence which has been printed as a record of various hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives. The titles are: (a) Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Sixty-third Congress, Second and Third Sessions, on H. R. 13305, dated February 27, 1914, to January 9, 1915. Hereafter abbreviated Report I. (b) Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, Sixty-fourth Congress, First Session, on H. R. 13568, dated May 30 and June 1, 1916. Hereafter abbreviated Report II. (c) Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, Sixty-fourth Congress, Second Session, on H. R. 13568, January 5 to 11, 1917. Hereafter abbreviated Report III.

These three reports contain much duplication, through testimony of the same witnesses and reprinting of the same documents. Yet they furnish the greatest fund of information as to the attitude of various interests advocating or opposing the legalization of price maintenance.

Scientific study of the subject is reflected in the *Proceedings of the American Economic Association,* Annual Meeting, December, 1915, at which a paper was presented by Professor F. W. Taussig and discussed by several economists; and in the article by William F. Gephart, *Some Economic and Legal Aspects of Fixed Prices,* Washington University Studies, vol. III, pt. II, no. 2, April, 1916.

The Chamber of Commerce of the United States has issued in pamphlet form the report of a committee appointed to investigate the matter, which contains a fund of information, especially on the legal aspect of resale price maintenance, presented at the Fourth Annual Meeting, Washington, February 8-10, 1916. Business interests have also carried on an active propaganda. The publications of the American Fair Trade League, the organization of the proponents, and the National Trade Association, that of the opponents, are for the most part reprints of government testimony and add little new material.

Trade magazines and newspapers contain numerous references and articles on price maintenance. The *Hardware Age,* the *Journal of Commerce and Commercial Bulletin, Printers' Ink, Publishers Weekly,* and *Women's Wear* have all devoted considerable space to the subject, the last named having reprinted practically in full the testimony of witnesses before the Federal Trade Commission, in October and November, 1917. The full record is said to cover some 1300 typewritten pages and probably will not be issued as a separate report.

introduced for the purpose of legalizing the practice;[2] while the Federal Trade Commission has been holding hearings recently in order to determine its jurisdiction and its attitude toward price maintenance and price cutting.[3] The alignment of interests for and against the principle is not illuminating from either a business or a political standpoint. Further, the close connection in certain conspicuous cases before the courts of the rights of patentees or of special privileges complicates matters; while the fact that the question of combination has been present in a few cases tends to obscure the issue still more.

Price maintenance is the term applied to the marketing policy which consists of the imposition by the manufacturer of restrictions upon the price at which an article identified by trade-mark, brand, copyright, or patent may be resold by a purchaser[4] or subpurchaser. Since price maintenance refers solely to the class of identified goods, the policy does not affect the great bulk of commodities entering into commerce, nor do the manufacturers as a

[2] *Cf. infra,* p. 28.

[3] The hearings were held, October 3-4, 23-24, 31; November 1 and 14, 1917.

[4] Professor F. W. Taussig confines his discussion of price maintenance to the "practice among manufacturers of prescribing the price at which their products shall be sold by retail dealers." *Cf.* AMERICAN ECONOMIC REVIEW Supplement, March, 1916, p. 170. The same principles are said to apply if resale prices of jobbers are prescribed. According to Dr. Paul H. Nystrom, *Economics of Retailing,* p. 255, it consists essentially of the limitation placed upon middlemen or dealers not to resell at more or less than a certain price named by the manufacturer or producer. The Report of the Committee of the Chamber of Commerce of the United States notes in the majority report (Report of Committee, p. 20) that they consider only the control of resale prices "upon identified merchandise made and sold under competitive conditions." In commenting upon Professor Taussig's definition, Professor Paul T. Cherington modifies the definition to read, "Price maintenance is the arrangement by which manufacturers of identified merchandise, made and sold under competitive conditions, agree with some or all of the distributors concerning the price at which it is to be resold." AMERICAN ECONOMIC REVIEW, Supplement, March, 1916, p. 200. But the mass of evidence presented before government bodies contains little or no reference to an "agreement" as the basis for price fixing. It is usually assumed that the price will be fixed solely by the manufacturer, not without reference to costs of distribution; although such costs are to be estimated by the manufacturer, not given to him by any particular set of retailers. *Cf.* for instance the statement of William H. Ingersoll before the Federal Trade Commission as to the position of the retailer. In addition the "agreement" of manufacturers, whether oral or written, with retailers would raise the question as to legality with respect to our antitrust laws. On this point, *Dr. Miles Medical Company* v. *John D. Park & Sons,* 220 U. S. 373, is of interest.

whole ask for it. Any departure in a downward direction from the market price, the customary price, or that fixed by the producers for resale is to be classed as price cutting, and the resulting prices are called cut prices. Cut prices may be placed upon all articles handled by a distributor, or only on a few. Since the strength of price appeal is enhanced when the consumer is acquainted with the goods, cut prices upon advertised articles are the more successful in attracting attention. Necessity for quick sale, lower costs, the adoption of the policy of rapid turnings of stock at low rate of margin may all lead to the reduction of prices upon identified merchandise. The advertising and selling of an identified article at less than the fixed price, or even at less than cost, for the purpose of inducing the purchaser to buy unidentified merchandise at a large profit to the retailer is sometimes distinguished from other reduction by use of the term *predatory price cutting*.[5] Though it is evident that this is not the only motive, in most of the discussion upon price cutting, predatory price cutting is the only type considered. Also it is often assumed that price maintenance is the opposite of price cutting,[6] whereas freedom of seller to maintain or vary prices as he sees fit is logically opposed to fixed resale prices.

Virtually all schemes of distribution are used in the marketing of identified goods. Where a manufacturer or his bona fide agent sells directly to the consumer, the question of resale price maintenance cannot arise,[7] because the manufacturer can fix his price to the consumer. Nevertheless, this method of marketing is not available for most manufacturers and may be uneconomical; it requires a large capital to be invested in a specialized distributing organization, which can often be only partially utilized. In selling direct to retailers the maintenance of resale prices up to recently has presented no great difficulty, because apparently the manufacturer could select his customers; therefore, having the right to refuse supplies to such as fail to maintain prices. Most manufacturers find it inadvisable to sell or to attempt to distribute

[5] Chamber of Commerce of U. S. Report, p. 13.

[6] *Cf.* Cherington, AMERICAN ECONOMIC REVIEW, vol. VI, no. 1, Supplement, pp. 201, 202.

[7] For instance, in the distribution of many specialties, especially those which require demonstration, cash registers, typewriters, pianos, adding machines, and in some cases automobiles. Some identified commodities are distributed through chains of retail stores belonging to manufacturers: Douglas shoes, Regal shoes, Huyler's chocolates, etc.

goods without the aid of the wholesaler as well as the retailer, while in some cases identified goods pass through the hands of a manufacturer's agent before reaching the wholesaler.[8] Consequently, in the subject of price maintenance all classes of middlemen have an interest, as well as the consumer.[9]

Price maintenance has developed in part as a concomitant of national advertising. It is needless to demonstrate the fact that during the past twenty-five years the amount of advertising by manufacturers direct to the consuming public through publications, especially those which have acquired a national circulation, has enormously increased. Two reasons may be assigned for national advertising; first, the desire of the manufacturer to increase the volume of his sales; second, the desire to secure the market and become semi-independent of middlemen. When the ultimate purpose of creating consumer demand has been accomplished, it is supposed that the manufacturer will find it much easier to secure the coöperation of middlemen; or will in a way be in a position to compel jobbers and retailers to handle his product. That resale prices in lines such as toilet goods, proprietary medicines, machinery and specialties of various types have been frequently controlled since the latter part of the nineteenth century is revealed by the various cases which have come before the courts, especially with respect to patented articles upon which price restrictions were imposed in various ways.[10] Trade-marked articles have been less often subject to such restrictions. But with these, as well as with patented or copyrighted articles, decisions of the Supreme Court have declared some of the popular forms illegal. The comparatively small amount of readjustment after these decisions would seem to indicate that the policy of restricted prices was not followed by an overwhelming majority of trade-mark or even patent owners. At present the policy of fixing resale prices

[8] *Cf.* L. D. H. Weld, "Marketing Agencies between Manufacturer and Jobber," *Quarterly Journal of Economics,* vol. XXXI, pp. 586-589 (Aug., 1917).

[9] No less an authority than Mr. (now Justice) Brandeis has contended that the maintenance of uniform prices by manufacturers is the logical extension of the one price system in retail stores. (Report I, p. 13; Report II, p. 204.) One of the principal opponents of legalized price maintenance is Marshall Field and Company, also pioneer in the one price system. The multiprice system in retail stores, resulting in discrimination between customers, has no basis in varying costs of distribution, which lack of uniformity of prices between stores may have.

[10] *Cf.* various decisions of Supreme and other courts cited, *infra.*

has been abandoned by numerous producers because of adverse judicial decisions against the methods used.

The history of price maintenance can be traced clearly in the book trade.[11] With the exception of a few local organizations of retailers which attempted to maintain prices, the book trade operated with no restrictions upon resale prices until about 1900. Following the example of the book trade in England, Germany, and certain other countries on the continent, two combinations, first one of publishers, then one of booksellers, were formed to establish a fixed price system and abolish the system of unrestricted discounts. A plan was formulated by the publishers' association and ratified by the booksellers' combination, whereby a net price system was adopted. A boycott arrangement was provided to punish those who failed to comply with the rules.[12] The association encountered serious opposition, in particular from a New York department store, Macy's, owned by Straus and Straus. Contrary to regulations, Macy's proceeded to cut the prices of net books. The association then applied the boycott provided for such cases; so that it was only by buying in small lots at great expense through agents stationed in various cities in the United States that the department store could secure books to supply its customers. In 1903 Macy's[13] took the matter to the courts, beginning a period of litigation which was ended a decade later. Macy's won a complete victory. The combinations were declared unreasonable restraint of trade and contrary to the Sherman law, and Macy's was awarded damages.[14] As a consequence of its failure to secure legal recognition for the principle for which it had primarily been organized, either by the courts or by statutory enactment, the American Publishers Association voted to dissolve in the fall of 1914. Since that time the individual publishers have

[11] *Cf.* H. R. Tosdal, "Price Maintenance in the Book Trade," *Quart. Journ. Econ.*, vol. XXX, pp. 86 et seq. and the references there given.

[12] Much information to be found in the reports of Macy cases; *Bobbs-Merrill Company* v. *Straus,* 139 Fed. 155; and *Bobbs-Merrill Company* v. *Straus,* 210 U. S. 339. *Cf.* also 231 U. S. *222.* References to other sources may be found in the footnotes to the *Quart. Journ. Econ.* vol. XXX, pp. 101 *et seq.*

[13] This department store has been one of the most prominent opponents of legalizing price maintenance. Either members of the firm or their counsel, Edmund E. Wise, have appeared at all the hearings before the House Committee on Interstate and Foreign Commerce and the Federal Trade Commission. In addition, they have been involved in several suits, especially with publishers and the Victor Talking Machine Company.

[14] 210 U. S. 339 (1908), 231 U. S. *222* (1913).

worked more energetically for statutory legalization of the fixed price system.[15]

Examination of the controversial literature shows that the advocates of price maintenance are much better organized than the opponents. Under the name of the American Fair Trade League an active propaganda has been carried on to create public sentiment in favor of fixed resale prices and to further the passage of bills to legalize and facilitate the practice.[16] Representatives of retailers, manufacturers, and jobbers are found in its list of officers and committees. Opposition to the policy of resale prices has been more recently organized in the body known as the National Trade Association.

Price maintenance is not solidly backed by any class of middlemen or manufacturers. Manufacturers of nationally advertised identified articles are, as might be expected, strongly in favor of legalization of the practice;[17] while they are actively seconded by the periodical interests, generally those with national circulation.[18] Nevertheless, some manufacturers of advertised goods have gone on record as opposed, while many more have not committed themselves. Manufacturers of unbranded or unidentified articles have no direct interest in the question and have not expressed themselves one way or the other.

Wholesalers and jobbers have in general kept aloof from discussions. A few wholesalers' associations in the drug, dry goods, automobile and automobile accessories, and jewelry trades; sectional or state associations of jobbers in these and the grocery, hardware, clothing, talking machine, and electrical supplies industries have declared for the policy; while the opposition has been noncommittal.[19] In general it may be said that the attitude of job-

[15] *Ibid.*, p. 106.

[16] The league also has other purposes.

[17] In the testimony for price maintenance, representatives of such manufacturers have been active. Counsel for the Ford and Packard automobile concerns; F. N. Nash, sales manager, General Chemical Company; Charles P. Miller, counsel, Howard Watch Company; representatives of Cluett Peabody; Victor Talking Machine Company; Colgate; E. T. Welch Company; B. V. D. Company; and the Mennen Company have been among those urging the legalization of price maintenance at various hearings.

[18] The Curtis Publishing Company, *Printers' Ink,* and *Publishers' Weekly* are among those actively favoring price maintenance. They represent the attitude of national advertisers.

[19] A list of the organizations, which are said by the American Fair Trade League to have endorsed the objects and aims of the Stephens bill for legal-

bers is not revealed in the evidence, though it might be reasoned that if price cutting were to the sole advantage of newer types of retailers, jobbers would be solidly advocating the bill to legalize price maintenance, because newer types are characterized by the tendency to dispense with jobber help.

Retailers as a whole are not united upon the question, nor are the different classes of retailers. It seems that many small independent retailers[20] are advocates of fixed prices, while department stores, chain stores, and mail order houses are opposed.[21] Yet some independent retailers are opposed,[22] while a number of department stores have gone on record as favoring fixed prices.[23] Nevertheless, it seems that the vast majority have not expressed themselves one way or the other. The referenda of the chambers of commerce and associations are to be taken with considerable reservation; many organizations went on record as favoring the measures by a small majority, inadequately understanding either price maintenance or the fact that disapproval of fraudulent advertising does not imply approval of price maintenance.

As is usual in discussions of questions of this character, the consumer plays little part directly in the various hearings or in the propaganda. The bulk of evidence submitted by representa-

izing price maintenance, containing the names of several hundred national, sectional, and local associations of business men, most of them retailers, but including a few wholesale organizations, is to be found in Report II, p. 48, and in a leaflet issued by the league. A shorter list was also submitted by Mr. Brandeis, Report I, p. 65. In addition, voluminous testimony on the part of representatives of retail organizations and of individual firms is to be found in all the reports of hearings. The position of the American Booksellers Association in favor of legalized price maintenance is to be contrasted with the opposing attitude of the American Library Association. The references in the New York *Journal of Commerce and Commercial Bulletin, Publishers' Weekly,* and *Printers' Ink,* as well as in the press in general, are so numerous as to make specific references inadvisable.

20 *Cf.* note 19.

21 Representatives of the Jordan Marsh Company of Boston, the Rike-Kumler Company of Dayton, Marshall Field Company of Chicago, and the R. H. Macy Company were among those who have actively opposed the legalization of price maintenance and have appeared at government hearings upon the subject.

22 The National Retail Dry Goods Association has gone on record as opposed; it includes small as well as large retailers.

23 *E.g.,* the Bloomingdale, Altman, Gimbel and Wanamaker department stores in New York; Shepard-Norwell, R. H. White department stores in Boston.

tives of consumers seems to indicate their general opposition.[24] The American Federation of Labor[25] and the American Federation of Women's Clubs[26] have recorded their opposition to legalizing price maintenance. However, testimony to the effect that consumers favor the policy is not lacking, though its value has been questioned.[27]

Price Maintenance and the Law

The policy of maintaining resale prices primarily is an economic policy, not a legal question. Nevertheless, in one form or another it has come before the courts upon numerous occasions. The legal history of price maintenance is full of inconsistencies and contradictions; of differences of opinion among judges and among inferior and superior courts. Seldom has price maintenance been judged solely upon its merits or demerits as a marketing policy from the point of view of public welfare. The majority of cases involve articles protected by the patent or copyright statutes in which the question of the legal rights of patentee or copyright holder figure more prominently than the economic expediency of the practice. A few cases deal with articles manufactured under secret processes, while others have involved the

[24] Professor Samuel McCune Lindsay's testimony before the Federal Trade Commission, October 3, 1917, represents the opposing attitude of numerous consumers' organizations. *Cf.* report in *Women's Wear,* October 4, 1917, p. 17.

[25] Letter of Mr. Samuel Gompers to Mr. John W. Hahn, secretary of the National Trade Association, dated July 11, 1916.

[26] *Cf.* Miss Wood's testimony, January, 1917, before the Committee on Interstate and Foreign Commerce; and November, 1917, before the Federal Trade Commission. *Cf.* Report III, p. 283 *et seq.; Women's Wear,* November 15, 1917, p. 19.

[27] Mrs. Christine Frederick, an editor of the *Ladies' Home Journal,* has testified as representing the consumer upon several occasions in support of price maintenance. The Curtis Publishing Company, which publishes the *Ladies' Home Journal* and other publications which are favorite media for national advertisers, is very strongly in favor of price maintenance. For Mrs. Frederick's statement, *cf. Report* I, p. 136 *et seq.*; Report II, p. 148; and for testimony before the Federal Trade Commission, see *Women's Wear,* October 29-30, 1917. Mrs. Julian Heath, president of the Housewives League, has testified as representing the sentiment of "women in America" in the public hearings, Report II, p. 184, but the disinterestedness of her testimony was called into question in the hearings held early in 1917 (Report III, p. 97 *et seq.*; reprinted by the National Trade Association. Rebuttal, Report III, p. 595 *et seq.*) by allegations that Mrs. Heath and the Housewives League were subsidized by large manufacturers, advocates of price maintenance.

question of combination for the purpose of securing the maintenance of fixed prices. Decisions upon the legality of fixed resale prices upon articles identified only by trade-marks have been rare in our courts.[28]

Because of the conflicting decisions the legal status of price maintenance is by no means settled. The courts seem to be opposed to it; the majority of binding decisions are at present contrary to the popular methods of enforcing the maintenance of resale prices. The following statements indicate briefly the present situation:

1. Combinations of manufacturers to maintain resale prices are in unlawful restraint of trade, and contrary to the Sherman act, even though articles be manufactured under special privileges granted by patent or copyright statutes. Furthermore, by a system of contracts, a single manufacturer may effect a combination with his jobbers and retailers which the courts will hold an unlawful restraint of trade.

2. The possession of patent or copyright privileges does not give the holder the right to restrict the sale by mere notice placed upon the article to the effect that it shall be sold at a certain price. Failure to comply does not constitute an infringement of the rights of the owner of patents or copyrights.

3. Courts are not agreed as to the legality of various methods of restricting resale prices by contract. Agreements or contracts between the manufacturer and distributor with regard to the fixation of resale prices will not be enforced by the courts if the method used results in unreasonable restraint of trade. Systems of contracts with jobbers and retailers have been held unlawful; but in certain cases it has been held that contracts as to resale prices are valid as to the immediate vendee, but not as to sub-purchasers. If the sale is full and complete in spirit if not in form, the courts

[28] In addition to the reported cases (*q.v.*), summaries of the law relating to price maintenance may be found in the Report of the Committee of the Chamber of Commerce of the United States, Majority Statement of Law, pp. 24-42 (also reprinted in Report III, p. 537 *et seq.*); Minority Statement of Law, pp. 43-78, 79-85. Also *cf.* Gephart, p. 172 *et seq.* and *The Legal Status of the Maintenance of Uniform Resale Prices,* a brief prepared by Charles L. Miller, for the American Fair Trade League, dated January 15, 1916 (reprinted in *Publishers' Weekly,* May 6, 1916, p. 1439 *et seq.* and in Report II, p. 57 *et seq.*). A brief statement is contained in an article by Charles L. Miller, *University of Pennsylvania Law Review and American Law Register,* November, 1914 (reprinted in Report I, pp. 139-145). Fairly complete reports of the principal cases are to be found in the files of the *Publishers' Weekly.*

will frown upon any attempt to impose restrictions without specific contract. Courts have come to no agreement as to the various methods of sales by contract in which only limited title is passed to the purchaser. But the selling of a license to use rather than the article itself has been declared unenforceable by the Supreme Court as a means of controlling resale prices.

4. The individual manufacturer of a trade-marked or secret process article does not possess the lawful right to restrict the resale prices either because he is the sole producer of the identified article or by virtue of his possession of a trade-mark or secret process.

5. Whether or not the manufacturer of a trade-marked article may attempt to enforce a fixed price by withholding supplies from a dealer who refuses to adhere to the price fixed is not fully decided. The matter is now up for adjudication.

6. The federal courts have not decided clearly the status of price cutting as an unfair trade practice under the common law and the Clayton act, while state courts are not agreed.

More detailed discussion of the foregoing points follows:

1. The maintenance of resale prices by means of a combination of manufacturers has been declared in restraint of trade and contrary to the Sherman act. An agreement of publishing houses to maintain resale prices on both copyrighted and uncopyrighted books was found to be illegal as to uncopyrighted books by state courts, while the Supreme Court of the United States in affirming this decision declared that the copyrighted books were not outside of the Sherman act because of special privileges to copyright holders.[29] The use of patents, or license schemes as a means of effecting combination to fix prices has also been declared illegal. Combination of manufacturers bound together by agreements or licenses concerning the use of patents has also been held to be illegal, notably in the so-called bathtub cases.[30] It has been held further that the combination to be in restraint of trade need not be between competing manufacturers, but may be effected by a system of contracts between the individual manufacturer and his distributors.[31]

[29] 177 N. Y. *Straus and Straus* v. *American Publishers Association,* 231 U. S. 222. Also *cf. supra,* p. 32.

[30] *United States* v. *Standard Sanitary Manufacturing Company,* 226 U. S. 20.

[31] *Dr. Miles Medical Company* v. *John D. Park and Sons,* 220 U. S. 373.

2. The decisions upon the legality of price maintenance by the individual manufacturer have in most cases hinged upon the method used. Considering only articles protected by copyright or patent statute, two methods have been adopted by various manufacturers in order to fix the prices of products of their manufacture. The first of these is the simplest, namely, that of placing a notice upon each article protected by copyright or patent to the effect that it may be resold only at a certain price, the notice usually stating that departure—a cut price sale—would be considered an infringement of the producer's exclusive rights.[32] Such was the method used by certain book publishers prior to 1908 until the decision of the Supreme Court was rendered in the Macy cases,[33] in which it was held that the copyright act gives no additional right to limit by notice the prices at which the subject of the copyright should be sold. Nevertheless in delivering the opinion of the court, Justice Day pointed out that there was a difference between the patent and the copyright law, and that he would not embarrass the question of the patentee's right to control the price by passing upon it then, but he distinctly stated that the Supreme Court had never conceded or recognized any such right in the patentee. Also in the Dr. Miles Medical case the court again refused to pass upon the question of the right of the patentee in this respect.[34]

The doubt remaining as to the right of the patentee to restrict

[32] *Cf.* Charles L. Miller, *Legal Status,* etc., p. 6.

[33] *Bobbs-Merrill* v. *Straus,* 210 U. S. 339 (1908).

[34] The first reported decision upholding the right of the patentee to fix the resale price of articles made under his patent was in 1901 (*Edison Phonograph Company* v. *Kauffmann,* 105 Fed. Rep. 960). The foundation for this decision was the judgment of the court in the so-called Heaton Button Fastener case (77 Fed. Rep. 228, *Heaton-Peninsular Button Fastener Company* v. *Eureka Specialty Company*) in which it was decided that a patentee might restrict the use of his machine so that it might only be used with supplies of the patentee's manufacture. Extending the reasoning to the case at hand, the court held that the payment of a fixed price might similarly be made a condition of its use. This case and the cases which followed it held that a violation of the price condition amounted to an infringement of the patent. Until 1912 the lower federal courts followed the ruling of this case.

The Dick Mimeograph case (*Henry* v. *A. B. Dick Company,* 224 U. S. 1) seemed to strengthen this view. Statement of the case by M. H. Robinson, AMERICAN ECONOMIC REVIEW, vol. 2, pp. 720-722 (Sept., 1912). In a recent action the Federal Trade Commission has disapproved of the tying contract of the A. B. Dick Company whereby they or manufacturers of mimeographs controlled 79 to 86 per cent of the business in stencil duplicating paper in 1915. Whether this will operate as a reversal of these parts of the Supreme Court

by notice the resale price at which the patented article was to be sold was removed by the Supreme Court decision rendered in 1913 in the Sanatogen case; in which, contrary to the majority of decisions in the lower courts,[35] by a five to four opinion the majority of the court argued that the patentee did not possess the right to fix resale prices upon a patented article by mere notice without contract. The patent act by its wording grants to the patentee the exclusive right to make, use, and vend the patented article. It was held that the exclusive right to vend under the patent statute should be interpreted in the same way as the "sole liberty of vending" in the copyright statute.

3. The legal status of the second chief method of enforcing fixed resale prices, namely, that of agreements of contracts with the vendees, is by no means so clear.[36] It appears that until recently a patentee might legally contract with the immediate purchaser of the patented article that a fixed resale price was to be observed.[37] But the power of the patentee in actual sales ex-

decision not already nullified by subsequent decisions is not clear. *Publishers' Weekly,* June 23, 1917.

The Dick decision gave rise to a pressing demand for a revision of the patent laws so as to restrict the monopolistic rights of the patentee, and to the introduction of several bills into Congress, in particular the Oldfield bill, H. R. 23417, August 8, 1912. *Cf.* also Report of the Committee on Patents, 62 Cong. 2 Sess., House of Representatives, No. 1161, August 8, 1912; and article by G. H. Montague, *Harvard Law Review,* vol. 26, p. 128.

[35] *Bauer et Compagnie* v. *O'Donnell,* 229 U. S. 1, usually called the Sanatogen case. Statement of the case by M. H. Robinson, AMERICAN ECONOMIC REVIEW, vol. 3, p. 982 (Dec., 1913).

[36] In the simplest form the plan consists of contracts between manufacturers and wholesalers by the terms of which the latter agree to supply retailers at a stated price, and to sell only to such dealers as will agree to maintain the standard retail price. A second form consists of contracts with the jobbers requiring them to sell only to dealers approved by the producer, with whom the manufacturer contracts directly that, in consideration of their being supplied with his product, they will sell only at the retail price named by the producer. These and other variant forms have been applied by manufacturers to patented and copyrighted articles and to secret process and trade-marked articles as well. *Cf. Legal Status of the Maintenance of Uniform Resale Prices,* prepared by Charles L. Miller, p. 7.

[37] *Henry* v. *Dick* (224 U. S. 1), *Bement* v. *National Harrow Company* (186 U. S. 570) and *Victor* v. *The Fair* (123 Fed. 424) are cited as authority, which according to a recent decision in the case of the *American Graphaphone Company and the Columbian Graphaphone Company* v. *The Boston Store of Chicago* has been held not to be affected by the decision in the Sanatogen case. The Graphaphone case has recently been appealed to the Supreme Court. The

tends no farther. He cannot by notice require also the observance of resale prices by subsequent buyers.[38]

The decision in the Sanatogen case cleared away some of the misconceptions which remained after the Mimeograph case of 1912. But even in this case, the court left some ground for believing that a method of transfer, not sale, could be devised, under which, by reserving an interest in the article which had changed hands, the price which successive holders should pay for its "use" might be arbitrarily fixed. They found that the packages of Sanatogen were sold with as full and complete title as any article could have when sold in an open market, excepting only the attempt to limit the sale or use when sold for less than one dollar.[39] But the court hinted that the case might have been different had there been any showing of "qualified sale" for less than value for limited use, or had there been a transfer of a limited right to use the invention.

The most recent decision upon this point by the Supreme Court is that of the *Victor Talking Machine Company* v. *Straus*, rendered April 7, 1917. The principal point involved in the case was whether in disposing of its machines by giving a license only for "use" for royalties (during the patent term) and not outright title to purchasers, the Victor Company might thus lawfully regulate and restrict the distribution of the product. In a six to three opinion, the court held that the license was in reality a sale, that

department store known as The Fair entered into agreements with the Graphaphone Company to comply with list prices, but sold goods delivered to them by the company's agent at less than the official list. Suit was brought and the contracts were held valid in the Circuit Court of Appeals, Seventh District. The appeal to the Supreme Court was taken on the basis of four questions, among them being that of violation of rights of the patentee, and the possibility of lawfully reserving a part of the monopoly right to sell in connection with the act of delivering his patented article to another for a gross consideration. The contracts are alleged to be in restraint of trade. *Cf.* also *United States* v. *Keystone Watch Company,* 218 Fed. 502 (1915).

[38] *United States* v. *Keystone Watch Company,* 218 Fed. 502 (1915). The Keystone Watch Company attempted to restrict the prices at which the wholesaler and jobber might sell to the retailer and to this end made direct agreements with the jobbers. These were held valid. But the company went further and by mere notice to the retailer accompanying the box in which the watch was sold by the jobber attempted to fix the minimum price at which the retailer might sell to the consumer. No direct agreement was made with the retailer.

[39] That is to say, the title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. *Journal of Commerce and Commercial Bulletin,* January 17, 1916.

the royalties were full consideration, and therefore the case fell under the principles of *Bauer* v. *O'Donnell.*[40] Nevertheless, later decisions of lower courts have upheld a slightly different form of maintaining resale prices in which the manufacturer makes agency contracts with the retailers and thereby contracts that the goods shall be sold at a fixed resale price. In a suit brought by the Ford Motor Company in the Circuit Court of Appeals, its contract method of maintaining resale prices was upheld.[41]

4. The status of price maintenance as applied to goods not protected by patent or copyright was in certain respects settled in 1911 in the Dr. Miles Medical case. The method of notice has not been applied to goods protected merely by trade-mark or secret process; there seems to have been little doubt that the manufacturer of a trade-marked article could not enforce resale prices by mere notice.[42] His right to enforce resale prices, especially

[40] The suit was started against the Macy concern in the District Court, Southern District of New York (*222* Fed. Rep. 524) in March, 1915; the bill was dismissed by Judge Hand. Appeal was taken to the United States Circuit Court of Appeals, Second Circuit; the dismissal was affirmed, but with leave to amend (*225* Fed. Rep. 535). The amended bill was dismissed September 15, 1915, by Judge Hough of the District Court, but upon appeal to the United States Circuit Court of Appeals, Second Circuit, the decision of the lower court was reversed (January 12, 1916), and an injunction to the manufacturers was granted, the opinion being rendered by Judge Lacombe, who also rendered the earlier decision in the Cream of Wheat case. This is the decision which is reversed by the Supreme Court. Upon the basis of this decision the Macy Company has sued the Victor Company under the Sherman act for triple damages amounting to $570,000. The action brought in September of 1917 has not yet been settled. For facts of case, *cf. Publishers' Weekly,* April 14, 1917, p. 1217.

[41] The Ford Motor Company brought suit against Benjamin E. Boone, Incorporated, of Portland, Oregon, to restrain the latter company from offering Ford cars at less than the regular prices. By a recent decision, October, 1917, reversing the decision of the primary court, the United States Circuit Court of Appeals for the Ninth Circuit holds that the Ford Company, under its agency contract, actually retains ownership of its cars until they reach the ultimate buyer and therefore has the right to uphold fixed resale prices. *Printers' Ink,* October 11, 1917, *et seq.; Publishers' Weekly,* October 27, 1917, p. 1427. In an earlier case involving the validity of the Ford Company's contracts, decided in December, 1914, *Ford Motor Company* v. *Union Sales Company,* the contracts were declared invalid. The cases were decided on technical grounds. *Cf.* G. H. Montague, *Printers' Ink,* December 2, 1915, p. 76 *et seq.*

[42] *Cf. Dr. Miles Medical Company* v. *John Park and Sons,* 220 U. S. 405. "One who manufactures and sells articles of commerce cannot apart from statute control the resale or use of such articles by mere notice to purchaser or sub-purchaser. The common law has been opposed to such restraint upon chattels." 27 *Harvard Law Review* 73. *Cf.* also Benjamin, *Sales,* sixth edition, p. 746.

as against the retailer, by a system of contracts made with jobbers and retailers generally was also denied him. Systems of contracts were declared unenforceable on the ground that taken together and considered as a system of merchandising they constituted an unreasonable restraint of trade.[43] The right of the seller of a trade-marked article to fix by contract resale prices has been upheld in isolated cases by state courts.[44]

5. Certain manufacturers of identified articles have attempted to enforce resale prices selected by judicious selection of customers; that is, by selecting those who made a practice of maintaining prices and refusing to sell to those who did not. The right of a manufacturer to refuse to sell to a price cutter is still undecided, although the right of vendors to select their bona fide customers is affirmed both at common law and by Section 2 of the Clayton act. The so-called Cream of Wheat case raised the question of the right of a single manufacturer to refuse to sell his product to a dealer who was not adhering to the fixed prices. The Cream of Wheat Company refused to fill further orders of the Great Atlantic and Pacific Tea Company because the latter persisted in selling the defendant's product below the standard price.[45] Pending the final suit for a permanent injunction against this form of discrimination, the Great Atlantic and Pacific Tea Company applied in the federal district court for a temporary injunction, which was denied, but upon appeal was granted in the higher court. Definite decision upon this point is to be expected

[43] The plaintiffs in the Miles and Hartmann cases were manufacturers of proprietary medicines who had secured contracts with a large part of the wholesale and retail druggists of the country. It was contended in the Miles case that the restrictions were not invalid, first, because they relate to proprietary medicines manufactured under a secret process; and second, because, apart from this, a manufacturer is entitled to control the prices on all sales of his own products (220 U. S. 400). The court held articles manufactured under secret processes have no special privileges over trade-marked articles.

[44] In the case of the *Fisher Flouring Mills Company* v. *C. A. Swanson* (76 Wash. 649), rendered by the Supreme Court of the State of Washington, the validity of oral contracts as to resale prices upon trade-marked flour was called into question. Mr. Swanson had sold flour at less than agreed prices; the milling company brought suit. The case is interesting because the decision was based entirely upon the court's view of public policy in the matter of price maintenance and price cutting.

[45] *Great Atlantic and Pacific Tea Company* v. *Cream of Wheat Company*, 224 Fed. 566 (1915). *Cf.* also Sumner H. Schlichter, "The Cream of Wheat Case," *Political Science Quarterly*, vol. 31, p. 392, *et seq.* The case is commented on in *Printers' Ink*, November 18, 1915, p. 61.

in a case now pending under an indictment by the Grand Jury of the United States at Norfolk against the firm of Colgate and Company, in which the government charges the company with refusing to sell its products to dealers who do not sell at the prices fixed by the company. This action, the government holds, suppresses competition among the distributors of Colgate products, as to the prices at which they shall sell, and creates a combination in restraint of trade, contrary to the Sherman act. This case is admittedly a test case because the government offered to withhold this prosecution if Colgate and Company would agree to discontinue the practices in question.[46]

None of the decisions or cases mentioned interfere with the right of the manufacturer to establish selling agencies and so control the price.[47] Though it will not avail the producer to call the distributors agents where they in reality purchase the goods, and the transaction has all the elements of a sale,[48] there is no objection to the control of prices through bona fide selling agencies.[49] The reservation by the manufacturer of a substantial royalty in the selling price of an article is a second method open to the manufacturer who wishes to control his price. But both this and the agency method give the agent or distributor certain rights as to return and impose certain obligations and financial burdens upon the producer which such manufacturers are loath to accept. The producer is compelled to assume certain of the functions, either wholly or in part, which in direct sale are performed by middlemen; among these the assumption of risk and financing.

6. Whether price cutting and price maintenance constitute un-

[46] *Printers' Ink,* November 15, 1917, p. 121; *ibid.,* December 27, 1917, p. 26; New York *Journal of Commerce and Commercial Bulletin,* December 21, 1917. Complaint has recently been filed by the Federal Trade Commission against the form of "free deal" used by the Ward Baking Company, and against their practice of fixing and maintaining certain standard prices. *Printers' Ink,* December 27, 1917, p. 65. Likewise "refusal to sell" is cited as a chief weapon used to maintain prices in a complaint filed by the commission against the Mishakawa Woolen Manufacturing Company. *Publishers' Weekly,* December 21, 1917.

[47] Report I, p. 127. *Cf.* also *Legal Status,* etc., by Miller, p. 14.

[48] *Dr. Miles Medical Company* v. *John D. Park and Sons,* 220 U. S. 373; *United States* v. *Keystone Watch Company,* 218 Fed. 502.

[49] Justice Holmes in a dissenting opinion (*Dr. Miles Company* v. *John D. Park and Sons,* 220 U. S. 411) said, "That a patentee may create selling agencies and so control the price goes without saying."

fair trade is a broader question affecting the legal status of price maintenance.[50] Put in this way, the problem involves the broadest aspects of public policy; the technical questions of sale and bailment, rights of patentees and copyright owners, and restraint of trade are subordinated to the immediate consideration of present economic and social expediency. Fixing resale prices is regarded by some as unfair trade, while others hold that refusal to adhere to resale prices is subject to the same criticism.[51] Common law has not unequivocally declared price cutting an unfair practice; neither have federal courts or the Federal Trade Commission passed upon the practice.[52] New Jersey has adopted an Unfair Trading Practices act which seems to prohibit price cutting upon advertised articles upon which resale prices have been fixed, while other states have statutes which may be so interpreted.[53] The attitude of European countries toward price maintenance and price cutting differs in some respects from the attitude of the United States; there is a tendency to deal liberally with restric-

[50] Local price cutting has been declared an unfair competitive practice in the Standard Oil Company cases, likewise the use of "fighting brands." Both of these practices were employed by manufacturers with the intent to destroy competition. They must not be confused with the refusal to maintain fixed prices as a form of price cutting. The effect and basis of the last differ radically from the practices mentioned.

[51] Fixing resale prices is regarded by some as unfair trade, among them Bruce Wyman, quoted in *Trust Laws and Unfair Competition,* Report, Bureau of Corporations, dated March 15, 1915, p. 317. Louis D. Brandeis is one of the best known advocates of the position that refusal to adhere to resale prices is unfair. *Ibid.,* p. 318; Report I, p. 4; Report II, p. 198.

Upon price cutting generally see *Trust Laws and Unfair Competition*; E. S. Rogers, "Price Cutting as Unfair Trade," *Harvard Law Review,* vol. 27, p. 139 *et seq.*; *Ibid.,* "Good Will, Trade-Marks and Unfair Trading," pp. 257-270.

[52] There are at present a number of cases pending before the Federal Trade Commission in which this question is involved. Hearings were held in October and November, 1917, in order to secure information as to public opinion.

[53] The New Jersey statute passed originally in 1913 (Ch. 219, 1913, Statutes of New Jersey) and amended later (Ch. 107, 1916, Statutes of New Jersey), has been upheld by the New Jersey Court of Chancery in a suit, *Ingersoll* v. *Hahne,* for cutting prices upon watches upon which a notice as to resale price had been affixed.

Also consult the *Report on Trust Laws and Unfair Competition* for details as to statutes in other states, pp. 192-195.

The Report of the Chamber of Commerce of the United States, pp. 79-95, gives a long list of excerpts from state statutes, most of which bear upon the subject of combinations and trusts to restrict prices.

tions upon resale prices and in some cases to legalize the practice, or to declare price cutting unfair competition.[54]

Whether price cutting will be finally declared unfair trade in this country will in the last resort depend upon the balance of advantage to the public. The various economic and social questions involved will have to be passed upon by the courts and by the Federal Trade Commission, and the social desirability of one policy or the other will be determined upon broader grounds than have been employed in most of the decisions upon such matters. It is probable that some classification of the various forms of price cutting will be evolved which will place certain forms in the category of unfair trade practices; others in the class of permissible; while in the absence of statutory enactment with specific enumeration a wide margin of doubt will persist, to be gradually dispersed as the number is increased.

As a consequence of the uncertain and, to them, unsatisfactory status of a number of the popular methods of enforcing the maintenance of resale prices, advocates of the policy have turned to legislation as the easiest and most effective means of securing satisfactory control of resale prices for manufacturers of identified articles. The first bill providing for the legalization of fixing resale prices by notice was introduced into Congress by the com-

[54] Information upon European conditions may be found in "Legal Status," etc., pp. 20-23; in the Report of the Committee of the Chamber of Commerce of the United States, pp. 30-32, 73-77; and in *Trust Laws and Unfair Competition,* pp. 579, 591, 650. In France a retailer may in general sell his goods at any price he chooses unless an agreement to the contrary has been made. Such agreements will be upheld. Failure to keep agreements or price cutting for the purpose of disparaging the value of another's goods have been held to constitute unfair competition. Agreements are binding only on the parties of the contract. Belgian courts in general follow the same principles. Contracts not to resell at less than certain prices are legal also in Germany; but the act of selling below the price fixed by the manufacturer in Germany is not of itself considered unfair competition at present (1915), although earlier decisions were not clear on the point. Whenever unfair means are used to obtain goods to sell at cut prices, the courts may deem the act of resale unfair. The English position is not clear, but the few decisions which have come from the courts seem to indicate the validity of contracts to fix resale prices. Denmark has specifically sanctioned the practice of fixed resale prices by statute. In the case of all European countries, however, the attitude toward trade restrictions, toward combination and the like is different from that in the United States, and their position upon price maintenance cannot be said to form an argument for the legalization of the policy in this country.

mittee on February 12, 1914, by Representative R. B. Stevens of New Hampshire.[55] Hearings were held at various times during the Sixty-third Congress by the Committee on Foreign and Interstate Commerce to which the bill had been referred, but no action was taken. Mr. Stevens was not returned by his constituency to the next Congress, but the bill was introduced late in 1915 without change by Representative Ayres of Kansas.[56] Early in the following year in slightly altered form a bill to legalize price maintenance by contract was introduced into the House of Representatives by Representative Dan V. Stephens of Nebraska,[57] and into the Senate a few weeks later by Senator Henry F. Ashurst of Arizona.[58] Since the bills were not reported out of committee, the bill was reintroduced by Representative Stephens in the early part of the Sixty-fifth Congress[59] and will undoubtedly remain as long as the favoring interests are so well organized, and until Congress and the public indicate more clearly their desires than they have up to this time. Senator Borah also introduced a measure into the Senate in 1916 which did not vary in its essential provisions from the Stephens-Ashurst bill, but it provided that the Federal Trade Commission should be allowed to regulate the prices charged by manufacturers.[60]

The Stephens-Ashurst bill,[61] which has formed the basis of most of the discussion, states that any producer who does not possess a monopoly over an identified article shall have the power to fix by contract the resale price for goods of his manufacture which must be maintained by wholesalers and retailers to whom he sells.

[55] Known as H. R. 13305. Hearings found in Report I.

[56] H. R. 4715, 64 Cong. 1 Sess.

[57] H. R. 9671, later H. R. 13568, 64 Cong. 1 Sess. Hearings held on May 30 and June 1, 1916, printed in Report II. Also H. R. 13568, 64 Cong. 2 Sess. Hearings held January 5-11, 1917, printed in Report III.

[58] S. 3945 and S. 5064.

[59] H. R. 212. In this connection, refer to speech of Hon. Dan V. Stephens in the House of Representatives, June 29, 1917.

[60] S. 5991, 64 Cong. 1 Sess. Representative Johnson also introduced an amendment to the Pure Food and Drug Act which affected price maintenance, and the Oldfield and Metz bills, having to do with patented and copyrighted articles respectively, are closely connected with the agitation for maintained prices. However, the Stephens-Ashurst bill has been the storm center of the agitation, and since it is the most inclusive, and has been most actively supported by certain members of Congress, is the one to which discussion is confined.

[61] Text of bill may be found in Report II, pp. 3-4.

The machinery provided for securing such control of resale prices is very simple. The right is to be acquired by registering a schedule of the prices selected with the Federal Trade Commission and by paying a registration fee of ten dollars. It is provided that prices shall be uniform for all dealers of like grade and that there shall be no discrimination among retailers and wholesalers. Certain provisions are made for sale of the identified articles at lower than registered prices. Such a concession was found necessary in order that articles which had become less valuable because of change of style, damage, or for other reasons might be disposed of at less than the full fixed price. According to the bill, such articles were to be first offered to the manufacturer not less than thirty days before the date set for the disposal sale. The manufacturer was given the option of repurchasing the articles at cost, and only if he refuses to exercise his option may the goods be sold at less than the fixed resale price. If a dealer intends to discontinue the sale of certain fixed price articles or if he intends to go out of business, and the sale is made in the course of winding up the business, variations from the uniform price are permitted only when prior offer is made to the producer, and if written statements are filed at the office of the Federal Trade Commission giving reasons for such sale and the statement of the refusal of the producer to accept the offer of repurchase. Section 2 of the bill was not included in the first bills upon price maintenance introduced into Congress, but the numerous complaints of public libraries and different types of institutions practically compelled the insertion of a provision exempting libraries and societies or institutions for religious, educational, scientific, and certain other purposes from operation of the proposed law.

H. R. Tosdal.

Boston University, College of Business Administration.